IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-412

BEN HILL LIVINGSTON AND BETTY RUTH BURGESS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition For Writ of Certiorari To The Court Of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

G. STEPHEN PARKER
Assistant Attorney General

THOMAS CHARRON
District Attorney
Cobb Judicial Circuit

Please serve:

G. STEPHEN PARKER
132 Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-3351

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The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Georgia Court of Appeals' decision in this case. That opinion is reported at 145 Ga. App. 792.

QUESTION PRESENTED

Was the Georgia Court of Appeals correct in holding that this Court's decision in Connally v. Georgia, 429 U.S. 245 (1977) should not be applied retroactively, to a search warrant executed prior to the date of that decision?

REASONS FOR DENYING THE WRIT

THE GEORGIA COURTS' HOLDING THAT CONNALLY V. GEORGIA, 429 U.S. 245 (1977) WAS NOT TO BE APPLIED RETROACTIVELY IS CONSISTENT WITH NUMEROUS DECISIONS OF THIS COURT, WHICH HAVE HELD THAT PROSPECTIVE APPLICATION OF NEW STANDARDS IN FOURTH AMENDMENT CASES IS GENERALLY APPROPRIATE.

The Georgia Court of Appeals rejected Petitioner's contention that Connally v. Georgia, 429 U.S. 245 (1977) should be applied in his case, to invalidate a search warrant issued on December 5, 1976, prior to the date of the Connally decision. Petition, Appendix A. The opinion in Petitioner's case cited the Georgia Court's previous decision in State v. Patterson, 143 Ga. App. 225, 235 S.E.2d 707 (1977).

In State v. Patterson the Court of Appeals reversed a trial court's decision that the Connally decision should be

applied retroactively. The Patterson opinion cited this Court's opinions in U.S. v. Peltier, 422 U.S. 531 (1975) and U.S. v. Calandra, 414 U.S. 338, 348 (1974). The Peltier opinion refused to apply retroactively the decision in Almeida-Sanchez v. U.S., 413 U.S. 266 (1973), in which the court had held that a warrantless automobile search conducted 25 miles from the Mexican border by agents acting without probable cause was violative of the Fourth Amendment.

Subsequent to the filing of the petition in this case, the Supreme Court of Georgia has specifically held that this Court's decision in Connally v. Georgia, supra, should not be applied retroactively. Contreras v. State, ____ Ga. ____ (Case No. 33798, decided October 17, 1978). Applying this Court's decision in U.S. v. Peltier, supra, the Georgia Supreme Court found that the law enforcement officials in question had relied in good faith on the Georgia statutory procedures in effect at the time of the search, as interpreted by the Georgia Supreme Court in Connally v. State, 237 Ga. 203, 227 S.E.2d 352 (1976). As in Petitioner's case, the search warrant had been executed prior to this Court's decision in Connally v. Georgia, supra, and the trial had taken place after that decision. Contreras v. State, supra.

Petitioner's assertion that this Court's Connally decision was merely an application of a fifty-year old principle set forth in Tumey v. Ohio, 273 U.S. 510 (1927) is unpersuasive. In Connally this Court held for the first time that a justice of the peace

who receives a fee for issuance of a criminal warrant may not be considered a "neutral and detached magistrate" within the meaning of the Fourth Amendment. Prior decisions had dealt with magistrates making final judgments or magistrates actually involved in the enterprise of ferreting out crime. See e.g., Ward v. Village of Monroeville, 409 U.S. 57 (1972); Johnson v. United States, 333 U.S. 10 (1948); Bevan v. Krieger, 289 U.S. 459 (1933); Bennett v. Cottingham, 290 F.Supp. 759 (N.D. Ala. 1968), aff'd, 393 U.S. 317 (1969).

This Court's decision in U.S. v. Peltier, 422 U.S. 531 (1975) summarized the Court's efforts in recent years to determine whether rulings in criminal cases should be given retroactive effect. Id. at 535-37. In discussing the retroactivity of cases involving the exclusionary rule, the court observed that decisions where "concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process . . ." have invariably been given only prospective application. Id. at 535. The Peltier decision summarized the underlying basis for these decisions:

> "[I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner." Id. at 537.

The Court's decision in Peltier also recognized that the purposes of the exclusionary rule were best served by prospective application, inasmuch as the rule is "a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." U.S. v. Calandra, 414 U.S. 338, (1974). See Michigan v. Tucker, 417 U.S. 433, 447 (1974). In its recent discussion of whether this Court's decision in Connally v. Georgia should be applied retroactively, the Georgia Supreme Court noted that the deterrent effect of the exclusionary rule is served by prospective application only, citing the Peltier decision. Contreras v. State, supra.

In holding that this Court's decision in Connally v. Georgia, 429 U.S. 245 (1977) should not be applied retroactively, the Appellate Courts of Georgia have ruled in accordance with and in reliance on applicable decisions of this Court. There is thus no basis for this Court to review the decision in this case.

CONCLUSION

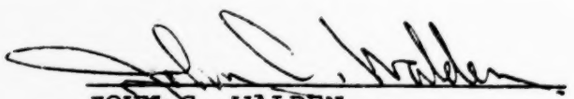
For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

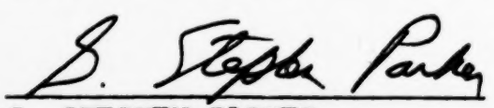
DON A. LANGHAM
First Assistant
Attorney General



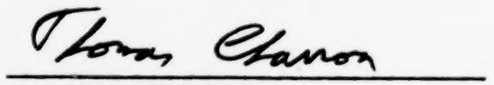
JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

G. Stephen Parker
132 Judicial Bldg.
Atlanta, Georgia
30334
(404)656-3351



G. STEPHEN PARKER
Assistant Attorney General



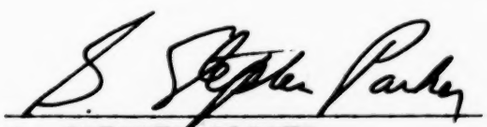
THOMAS CHARRON
District Attorney
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage to:

Mr. Thomas J. Browning
Barnes & Browning
P. O. Box 751
191 Lawrence Street
Suite 505
Marietta, Georgia 30060

This 30 day of October, 1978.



G. STEPHEN PARKER